No. 87-1602

In The
Supreme Court of the United States
October Term, 1988

RONALD D. CASTILLE, District Attorney of Philadelphia County; THOMAS FULCOMER, Superintendent, Huntingdon State Correctional Institute; and LEROY ZIMMERMAN, Attorney General of Pennsylvania,
Petitioners,

v.

MICHAEL PEOPLES,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

GAELE MCLAUGHLIN BARTHOLD*
Deputy District Attorney
ELIZABETH J. CHAMBERS
Assistant District Attorney
Chief, Federal Litigation
LAURIE MAGID
Assistant District Attorney
WILLIAM G. CHADWICK, JR.
First Assistant
District Attorney
RONALD D. CASTILLE
District Attorney

*Counsel of Record

Office of the District Attorney
1421 Arch Street
Philadelphia, PA 19102
Telephone: (215) 686-5700

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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SUPPLEMENTAL ARGUMENT

BECAUSE OF RESPONDENT'S NON-COMPLIANCE WITH APPLICABLE STATE PROCEDURES, HIS HABEAS CLAIMS WERE NOT PRESENTED TO THE HIGHEST STATE COURT IN A POSTURE PERMITTING THEIR REVIEW ON THE MERITS.

Certiorari was granted in this case to consider whether the Third Circuit's mere presentation rule, which was applied instantly, accords with congressional intent embodied in the habeas corpus exhaustion doctrine. Abandoning the reasoning of the Third Circuit panel which

decided this case, the precedent on which it relied, and his own prior arguments, respondent now agrees that the Third Circuit rule conflicts with this Court's precedents and declines to defend it. Instead, he improperly attempts to turn the significant issue here presented into a mere state law question.[1]

Rather than defending the Third Circuit rationale, from which he benefitted, respondent contends before this Court that the grant of a hearing on the merits of his petition was proper, notwithstanding the panel's incorrect reasoning, because, as a matter of state law, he had complied with all state procedures necessary to permit review

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[1]Respondent also incorrectly suggests that the mere presentation rule is not really a matter of Third Circuit law but results from a broad interpretation by petitioner. A reading of *Chaussard v. Fulcomer,* 816 F.2d 925 (3d Cir.), *cert. denied,* 108 S. Ct. 139 (1987), belies this contention, as does the Third Circuit opinion in this case which squarely raises the mere presentation rule for this Court's consideration.

Respondent relies on *O'Halloran v. Ryan,* 835 F.2d 506 (3d Cir. 1987), to support his premise. It, however, was decided before this case, and cogently points out that there exists a clear conflict within the Third Circuit regarding the exhaustion doctrine. *Ross v. Fulcomer,* 610 F. Supp. 560 (E.D. Pa. 1985) and *Moore v. Fulcomer,* 609 F. Supp. 171 (E.D. Pa. 1985), cited in petitioner's principle brief, demonstrate that the mere presentation rule is regularly applied within the Third Circuit. As a result, the panel here, although plainly cognizant of respondent's state court defaults, mechanically ruled that the exhaustion doctrine was satisfied simply because it found that respondent's habeas claims had been presented in some fashion to the state supreme court.

on the merits of his habeas claims by the state's highest court. Respondent's contention is erroneous.[2]

Respondent did not comply with the state requirement that all claims upon which discretionary review is sought be included in a petition for allowance of appeal; not one of his habeas claims was included in his counselled petition for allowance of appeal (*allocatur*). Because of their omission from that document, the habeas claims were not reviewable on the merits, and federal exhaustion requirements were not met.

Apparently respondent believes that his *pro se* petition, requesting the appointment of counsel, was sufficient to present his habeas claims to the highest state court for review on the merits. The state court's treatment of the document, however, demonstrates that, as a matter of state practice, it was not. The *pro se* document merely

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[2]Respondent also incorrectly persists in blending his *Bighum* claim with his claim that he was cross-examined in violation of a state statute. He erroneously refers to these distinct claims as merely characterizations of the same issue.

The claim of a violation under *Commonwealth v. Bighum,* 452 Pa. 554, 307 A.2d 255 (1973), challenges *whether* an accused's prior *crimen falsi* convictions may be used to impeach him at trial. This issue is quite distinct from error based on state statute, 42 Pa. Cons. Stat. Ann. § 5918 (Purdon 1982), which governs *when* the prosecutor is permitted to introduce such impeachment matter, if, under *Bighum,* the prior convictions are admissible. A trial court's ruling permitting the use of *crimen falsi* impeachment might be quite correct under *Bighum,* but reversible error could still occur if the prosecutor introduced the impeachment evidence contrary to § 5918. Indeed, in state court, respondent fully recognized that these were distinct claims when he alleged the *Bighum* claim as one of court error (J.A. 12), but alleged the statutory claim in terms of prior counsel's ineffectiveness for failing to raise it below (J.A. 51-52, 65).

constituted a successful petition for the appointment of counsel. The state supreme court, upon its grant of respondent's request for counsel, permitted him to raise all of his issues in the counselled *allocatur* petition which he was allowed to file. He chose then to raise but two issues, neither of which were contained in his subsequent habeas petition.[3]

Alternatively, respondent argues that, although the state practice was not followed, for purposes of the comity-based federal exhaustion rule the *pro se* document should be deemed sufficient. Specifically, he contends that since no state statute, rule or decisional authority required the state high court to treat his petition as a request for counsel, rather than as a request for discretionary review, the Pennsylvania Supreme Court's treatment of his *pro se* petition should be afforded no deference by the federal

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[3]The Commonwealth, pursuant to the state supreme court's usual practice with respect to requests for counsel by *pro se allocatur* applicants, declined to address the merits of the *pro se* document, pending either disposition of the request for counsel or a court request for a response on the merits (J.A. 60). The state high court granted the request for counsel and permitted the filing of a counselled *allocatur* petition (J.A. 61). When submitted, that petition presented the two issues which counsel evidently considered to have the most promise. Respondent did not disagree with counsel's limitation of the issues or urge review of other claims asserted in the prior *pro se* pleading. Even had respondent so acted, a decision by the state high court not to review that *pro se* filing would have been proper. The determination of which claims to raise on appeal is within the province of appellate counsel's strategic decisions, and, absent a demonstration of appellate counsel's ineffectiveness, his decision controls. *See, e.g., Murray v. Carrier,* 477 U.S. 478 (1986). Under state practice, then, the state high court had but two issues, neither encompassing any of respondent's habeas claims, upon which to consider the grant of discretionary review.

habeas court. Respondent contends, and the Third Circuit found, that, for purposes of federal law, the state court should be presumed to have reviewed the merits of the *pro se* document, even though under state practice that court concededly did not do so. This finding was unwarranted.

The state court's action was premised on basic considerations of the attorney-client relationship, as reflected in the decisions of this Court. The fact that such considerations are not codified in any of the ways listed by respondent has no bearing on the legitimacy of the state court's action or on the propriety of that action as a basis for deference by the federal habeas court. Instantly, the state supreme court's "opportunity" for review was limited to those claims presented in the counselled petition, and the Third Circuit's contrary conclusion must be reversed. Any other result abrogates the judicial prohibition against *sua sponte* consideration of issues not offered by the parties, *see e.g., Picard v. Connor,* 404 U.S. 270, 277 (1971), and ill-serves the interests of comity.

Further, even if the *pro se* petition were to be considered in determining compliance with the exhaustion requirement, respondent's exhaustion argument still fails. Respondent contends that each of his habeas claims was raised, either in the *pro se* or the counselled petition, as a properly layered claim of the ineffectiveness of counsel. He wrongly concludes, however, that, by raising layered claims of ineffectiveness, he thereby satisfied federal exhaustion requirements as to his habeas claims.[4]

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[4]The *pro se* document was somewhat ambiguously drawn and was capable of different interpretations. Reading the docu-

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First, as noted in petitioner's principle brief, not all of respondent's habeas claims were properly layered in state court. Specifically, the due process and equal protection violations, based on a denial of respondent's state law right to a bench trial, were not preserved by alleging Superior Court counsel's failure to raise and preserve the claims. Such an allegation was essential since the claims were omitted in respondent's Superior Court appeal (*see* Brief for Petitioner at 13). Similarly, respondent's habeas challenge to trial counsel's ineffectiveness for failing to litigate the second stop of respondent by police and the related seizure of evidence, was not asserted at the first available opportunity, as required by state law, *i.e.*, when new counsel assumed representation at the Superior Court level. The counselled *allocatur* petition did allege Superior Court counsel's ineffectiveness, but only ineffectiveness for not challenging the correctness of the trial court's physical evidence suppression ruling. That claim did not preserve a challenge to trial coun-

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ment in a light it deemed to be most favorable to respondent, the Third Circuit panel concluded that respondent's habeas claims were substantively alleged therein. Based on that finding, the panel deemed the exhaustion rule satisfied, notwithstanding the procedural defaults that it found had occurred in the lower courts (J.A. 96-97).

Conceding that the exhaustion principle relied upon by the panel is erroneous, respondent now reinterprets the *pro se* document. He does not allege that it substantively raised his habeas claims, but rather alleges that claims not otherwise properly preserved as a matter of state court practice and procedure could be substantively considered because they were raised by layered ineffectiveness claims. As discussed more fully *infra*, respondent's reinterpretation is unavailing and provides no basis for relief.

sel's performance with respect to the suppression hearing (*see* Brief for Petitioner at 14-15).

Even if the ineffectiveness claims had been properly layered, however, their review on the merits by the Pennsylvania Supreme Court was precluded for several reasons. In contending otherwise, respondent relies primarily on *Commonwealth v. Turner*, 469 Pa. 319, 365 A.2d 847 (1976), a case in which the Pennsylvania Supreme Court heard an appeal as of right in a felonious homicide case.[5] The posture of respondent's case was significantly different. He attempted to place claims—as to which there were no substantiating records and as to which there had been no prior rulings on the merits—before the state supreme court by way of a petition for allowance of appeal. Such petitions are granted only when they present issues of general importance that transcend their legal correctness with respect to the particular case on appeal. *See* Pa. R. App. P. 1114. As denials of such petitions are not rulings on the merits of the claims contained therein, *see Commonwealth v. Tarver*, 493 Pa. 320, 331, 426 A.2d 569, 575 (1981), rejection of respondent's *allocatur* petition, raising previously undecided claims, which lacked underlying substantiating records, was legally insignificant for exhaustion purposes. *See Pitchess v. Davis*, 421 U.S. 482 (1975). A ruling on the merits of those claims, however, remains available to respondent by proceeding in the state collateral review forum. Thus, respondent's failure to follow this state procedure to obtain review on the merits of his

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[5]That court no longer has such expansive direct appellate jurisdiction, and is now primarily an *allocatur* court. *Compare* 42 Pa. Cons. Stat. Ann. §§ 721-726 (Purdon 1981), *with* former Pa. Stat. Ann. tit. 17, § 211.202 (Purdon 1978).

claims is fatal to his claim that he exhausted state remedies.

Equally erroneous is respondent's suggestion that the state supreme court's decision not to remand the layered ineffectiveness claims to the trial court for development of a factual record means that the issue was resolved somehow for exhaustion purposes. The effect of the state supreme court's dismissal was to open the state post-conviction remedy to respondent for development of a factual record. State law contemplates use of the collateral remedy for precisely this purpose. *See Commonwealth v. Dancer,* 460 Pa. 95, 100, 331 A.2d 435, 438 (1975) ("claims of the ineffectiveness of counsel may only be raised in PCHA [Post Conviction Hearing Act] proceedings . . . where the petitioner is represented on direct appeal by new counsel, but the grounds upon which the claim of ineffective assistance are based do not appear in the trial record"); *Commonwealth v. Smith,* 321 Pa. Super. 170, 207, 467 A.2d 1307, 1326 (1983) (rehearing granted as to defendants other than Smith) (although the belated raising by counsel of his own ineffectiveness waived the issue for purposes of direct appeal, "we observe that Appellant Smith is not foreclosed from having this claim heard on collateral attack"); *Commonwealth v. Cook,* 230 Pa. Super. 283, 284, 326 A.2d 461 (1974) ("In the absence of clear and irrefutable on-the-record proof that counsel was ineffective, we cannot decide an ineffective assistance of counsel claim on direct appeal. Rather, in such circumstances, we will wait until an evidentiary hearing has been held upon

an appropriate request for relief under the Post Conviction Hearing Act.").[6]

Use of the state collateral review court, rather than the state trial court, for documentation of a litigant's ineffectiveness claim(s), is irrelevant for federal habeas exhaustion purposes. A determination as to which route must be followed, since it involves a matter of state practice and procedure, is an appropriate state court decision. In either case, the litigant has the opportunity to obtain the necessary factual findings and the subsequent lower court judgment would be subject to appellate review. Comity, therefore, requires that federal habeas review here be deferred pending the outcome of state collateral review litigation. *See Duckworth v. Serrano,* 454 U.S. 1 (1981) (circumvention of the exhaustion of remedies doctrine is not permitted unless there is no opportunity for redress in the state court).[7]

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[6]Respondent bottoms his claim in part on *Commonwealth v. Dessus,* 423 Pa. 177, 224 A.2d 188 (1966), although the doctrine of basic and fundamental error on which it relied was expressly rejected by the Pennsylvania Supreme Court in *Commonwealth v. Clair,* 458 Pa. 418, 326 A.2d 272 (1974), and *Commonwealth v. Mitchell,* 464 Pa. 117, 346 A.2d 48 (1975). Moreover, he incorrectly asserts that *Commonwealth v. Cook* has been overruled and cites no authority as support. To the contrary, its disposition is fully contemplated by state law.

[7]The circumstances of this case are entirely distinct from those considered in *Brown v. Allen,* 344 U.S. 443 (1953). There, this Court decided that it is unnecessary to resort to a state's collateral remedy where issues have been decided on direct appeal. Here, because the ineffectiveness claim is raised for the first time in a request for discretionary review, the state fact-finding court has been bypassed. Resort to the state collateral remedy for the omitted factual determinations does not involve the kind of duplicative state review at issue in *Brown.* Thus, it is not governed by that decision.

Nor is the denial of relief compelled on state law grounds alone. Even if the layering of the ineffectiveness claims to the state high court was sufficient under Pennsylvania law for those claims to be reviewed on the merits, and even if respondent had properly layered all of his ineffectiveness claims, he still has not satisfied exhaustion requirements for his habeas claims. Under respondent's reasoning, he has exhausted five particular sixth amendment claims of the ineffectiveness of counsel. These are not, however, the claims which were raised in his federal habeas petition.

In that petition, respondent presented three substantive issues: (1) an alleged violation of a state statute prohibiting cross-examination of a defendant about his prior criminal convictions (J.A. 73); (2) deprivation of respondent's putative right to a non-jury trial (J.A. 74); (3) the admission of suggestive and tainted identification evidence (J.A. 74). Respondent alleged that these constituted violations of his due process and/or equal protection rights. He made no reference to any ineffectiveness of counsel claims or sixth amendment violations which are more difficult to establish. *See Strickland v. Washington,* 466 U.S. 668 (1984.) His two remaining habeas claims referred only to the ineffectiveness of *trial* counsel in failing to seek suppression of certain evidence and failing to object to unrelated crimes evidence (J.A. 74-75). These claims were not properly layered; they did not properly raise any sixth amendment violations as they failed to contain any allegation of appellate counsel's ineffectiveness for not then presenting these claims in state court.

Sixth amendment counsel ineffectiveness and fourteenth amendment due process and/or equal protection

violation are plainly distinct. They employ and involve different amendments, rights, legal principles and case law. Allegation of the same facts in state and federal courts will not satisfy exhaustion requirements where, as here, the theories presented in each forum are distinct. *See, e.g., Picard v. Connor,* 404 U.S. 270 (1971) (although based on the same facts, claimed violation of fifth amendment grand jury requirement neither presented nor exhausted claim of violation of fifth amendment equal protection clause). Nor will the allegation of the same legal theory, but based on different facts, suffice for exhaustion purposes. *See also Pillette v. Foltz,* 824 F.2d 494 (6th Cir. 1987) (no exhaustion when different reasons for ineffectiveness presented in state and federal courts); *Gornick v. Greer,* 819 F.2d 160 (7th Cir. 1987) (same); *Gibson v. Scheidemantel,* 805 F.2d 135 (3d Cir. 1986) (same). Respondent treats his allegations of ineffectiveness in state court as mere verbiage used to skirt around the law on waiver and exhaustion, which may simply be discarded upon reaching federal court. He fails to recognize that, even under his own reasoning, the layered claims of ineffectiveness are the only claims preserved.

To assert as respondent does that a claim of ineffectiveness of counsel grounded in the sixth amendment is the same as a claim concerning the underlying basis of the ineffectiveness claim and grounded in the fourth, fifth, or any other amendment, is to strip the notion of "substantial equivalence" of any meaning.[8] A state court faced

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[8]Equally erroneous is respondent's attempt to convert his sixth amendment claims asserted in state court into the sub-

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with an ineffectiveness claim is given the opportunity to grant or deny relief based only on principles of counsel ineffectiveness, not on other constitutional principles surrounding the underlying claim. The presentation of a particular complaint in state court merely as a basis for the ineffectiveness of counsel cannot "provide the state courts with a 'fair opportunity' to apply controlling legal principles to the facts bearing upon his" particular complaint. *See Anderson v. Harless,* 459 U.S. 4, 6 (1982). Accordingly, it cannot be the basis for finding exhausted the claims upon which respondent sought habeas corpus relief. *See Williams v. Armontrout,* 679 F. Supp. 916, 926 (W.D. Miss. 1988) (claim of ineffectiveness for failure to object to the admission of other crimes evidence does not fairly present the claim that the other crimes evidence was inadmissible).

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stantial equivalents of the due process claims he asserted in federal court by noting that in raising his sixth amendment claims he argued that he was denied a "fair trial." Contrary to respondent's contention, claims regarding the denial of a fair trial are not synonymous with due process claims and are just as consistent with a sixth amendment claim as with a due process claim. In this Court's seminal case on the sixth amendment right to effective counsel, *Strickland v. Washington,* 466 U.S. 668 (1984), the Court defined prejudice from an ineffective attorney as arising from "errors so serious as to deprive defendant of a *fair trial,* a trial whose result is not reliable." *Id.* at 687 (emphasis added). Allegations regarding the denial of a fair trial are as likely to be made in claims of trial error grounded in the fourth amendment or sixth amendment as they are in claims grounded in the due process clause of the fifth amendment. Any claim that a serious error was made at trial necessarily includes a claim that the trial was somehow not fair.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in petitioner's principle brief, it is respectfully requested that the order of the United States Court of Appeals for the Third Circuit be reversed and that the case be remanded for further proceedings consistent with this Court's opinion.

Respectfully submitted,

GAELE MCLAUGHLIN BARTHOLD*
Deputy District Attorney
ELIZABETH J. CHAMBERS
Assistant District Attorney
Chief, Federal Litigation
LAURIE MAGID
Assistant District Attorney
WILLIAM G. CHADWICK, JR.
First Assistant
District Attorney
RONALD D. CASTILLE
District Attorney

*Counsel of Record

Office of the District Attorney
1421 Arch Street
Philadelphia, PA 19102
Telephone: (215) 686-5700